Supreme Court, U.S.
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No. 01-1554

IN THE

Supreme Court of the United States

STEVE MIDDLETON,

Petitioner,

v.

BALL-FOSTER GLASS CONTAINER CO., L.L.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

RICHARD M. KOBDISH
FULBRIGHT & JAWORSKI L.L.P.
Attorneys for Respondent
2200 Ross Avenue
Suite 2800
Dallas, Texas 75201
(214) 855-8000

173793

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED IN RESPONDENT'S BRIEF IN OPPOSITION

1. Are the "Questions Presented for Review" proffered by Petitioner premised upon "factual" assertions that were rejected by the courts below?

2. Was Petitioner "disabled" with the meaning of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12102(2)?

3. Was Petitioner a qualified person with a disability within the meaning of the Americans With Disabilities Act, 42 U.S.C. § 12111(8)?

4. Assuming for the sake of argument that Respondent had a duty to engage in a reasonable accommodation "interactive process" with Petitioner with respect to his coming back to work after his injury, did Respondent fulfill that "duty" within the meaning of the Americans With Disabilities Act, 42 U.S.C. § 12111(9)?

5. Was Petitioner "retaliated against" within the meaning of the Americans with Disabilities Act, 42 U.S.C. § 12203(a)?

6. Did the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") properly state the rules of law set forth by this Court in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002)?

7. Did the Fifth Circuit "ignore" Petitioner's evidence?

8. Does the Petition raise any issue warranting review by this Court?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Ball-Foster Glass Container Co., L.L.C., is a wholly owned subsidiary of Saint-Gobain Corporation.

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I. OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are reproduced as Appendix A, Appendix B and Appendix C to the Petition ("Pet."; "Pet. App."). The Award of the Arbitrator which was issued pursuant to a collective bargaining agreement proceeding in this matter is reprinted as the Appendix to this Brief in Opposition ("Arb. Award App.").

II. APPLICABLE STATUTES

In addition to the statutes quoted in the Petition, pp. 1-3, the following statutes also are applicable to this case:

> **Qualified individual with a disability**. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . . 42 U.S.C. § 12111(8).

x x x

> **Retaliation**. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. 42 U.S.C. § 12203(a).

III. STATEMENT OF THE CASE

As found by the District Court:

> Ball-Foster's ["BFG"] Waxahachie, [Texas], plant manufactures glass bottles. Prior to his injury, [Steve Middleton "Middleton"] was employed as a floor person/apprentice operator in the part of the plant where molten glass is formed by

> machines into bottles, known as the "hot end"; the "cold end" is the part of the plant where the bottles are inspected, put into boxes, stored in a warehouse, etc. Prior to becoming a floor person/apprentice operator, [Middleton] worked at various jobs in the cold end. Pet. App. 6.

On May 30, 1996, Middleton suffered a back injury on the job, and then later took an extended medical leave of absence for surgery and recovery/rehabilitation. R, Vol. 2, 464-68. Middleton returned to work on January 5, 1998. R, Vol. 2, 489. Thus, Middleton was absent due to his back injury for over fifteen (15) months. Shortly after his return, Middleton continued to suffer health problems. He was off work for two (2) days in January, 1998, and then for two (2) weeks in February, because of the side effects of pain medicine. R, Vol. 3, 501-02. On March 2, 1998, Middleton changed his "treating doctor" to Charles Osborn, a chiropractor. R, Vol. 3, 503. It is significant that, when he first started treating Middleton, Osborn's medical opinion was that his work restrictions were *permanent*. R, Vol. 3, 504.

Thus, on March 27, 1998, Osborn wrote an "Employee's Work Limitation Slip" on which he stated that Middleton had *permanent* limitations. He also recommended a "badge change," which would require a job reassignment from the hot end floor person/apprentice operator position. R, Vol. 3, 518, 538, 557-62. Osborn testified that what he meant by the word "permanent" was "lasting forever." The "badge change" recommendation meant "switching [Middleton] to a light duty position . . . altering [his] job status." R, Vol. 3, 538, 556, 562-63. At an arbitration hearing,[1] Middleton reemphasized that this March

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1. Like all bargaining unit employees at BFG's Waxahachie plant, Middleton is represented by the Glass, Molders, Pottery, Plastics & Allied Workers Union, AFL-CIO, CLC (the "Union"). On October 16, 1998, the Union filed a grievance on Middleton's behalf, alleging as contractual violations the actions made the subject of this Petition; *i.e.*, "[D]id the Company violate the collective (Cont'd)

27 restriction was *permanent* with respect to his floor person/ apprentice operator job, although he believed some of the "cold end" jobs were possibilities. R, Vol. 3, 453. Further, in his Answers to BFG's First Set of Interrogatories, Middleton stated: "On or around March 27, 1998, I was released to work [on] *permanent* light duty." R, Vol. 3, 576 (emphasis added).[2]

On April 15, 1998, Middleton filled out a "Statement of Claim . . . During *Total* Disability." R, Vol. 3, 579 (emphasis added). Significantly, Osborn stated on the second page of this form that: (a) Middleton was "totally disabled" "for his regular occupation," and (b) he would "*never*" be "able to resume . . . work" for "his regular occupation." R, Vol. 3, 180 (emphasis added). Osborn testified that this meant that Middleton was totally disabled from performing his former duties. R, Vol. 3, 539-40, 564-66.[3] Significantly, Middleton himself understood

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bargaining agreement by refusing to return [Middleton] to his employment as and when it did, following his injury at work on May 30, 1996?" Arb. Award, App. 2. Thereafter, an arbitration hearing was held before a mutually-selected neutral. On July 11, 2000, the Arbitrator issued his Award (Arb. Award, App. 1-34) which denied the grievance in its entirety (Arb. Award, App. 34).

2. Middleton argues that when he was given his first "limitation slip" from Osborn in March, 1998, there were "cold end" jobs he could have performed. Pet. 6, 21-24. His "proof" for this contention is a "Declaration" which Middleton tendered to the District Court. Pet. App. 43-55. However, in this Declaration, Middleton never explains how, if he was not at the plant, he possibly could know what jobs needed to be filled (if any), whether his physical limitations were consistent with any open job requirements, whether he had seniority to get those jobs, or how long BFG needed someone to perform them. In short, Middleton's "evidence" is nothing of the sort.

3. Middleton alleges that Osborn's reason for stating on the form that Middleton would never be able to perform his old job was because "BFG had refused to return [him] to that position." Pet. 6. However, BFG had not definitely "refused" Middleton anything at that time, but if

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that the work restrictions which Osborn placed upon him were *permanent*, meaning that they would last "forever." R, Vol. 2, 435-36, 498-99.

On or about May 8, 1998, Osborn signed a second "Employee's Work Limitation Slip." R, Vol. 3, 600. Instead of the "permanent" restrictions and "badge change" recommendations, which were an integral part of the first such "limitation slip" dated March 27 (R, Vol. 3, 518), this new one alleged that the limitations were "temporary for 8 weeks," and there was *no* "badge change" recommendation.[4] Julia Kirchner ("Kirchner") (BFG's Human Resources Manager) was concerned and suspicious about this second "employee's work limitation slip."[5] As Kirchner put it, it was

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it had, it would only be because of what *Osborn* earlier had stated. In addition, the form said nothing about such "company refusal," so there was no way for BFG to know that Osborn meant anything other than exactly what was on the form. Finally, as the Arbitrator concluded, Osborn was "something less than credible" as a witness. Arb. Award, App. 31.

4. Middleton claims that Osborn's "new restrictions" meant he could perform his old "hot end" job if another employee assisted him, and that he could also do a "light job" in the "cold end." Pet. 6-7. The "factual" basis for this assertion is his Declaration (Pet. App. 49) but said assertion is controverted by the new "limitation slip" which says no such thing (the evidence shows that Osborn's after-the-fact "explanation" for these entries on the form were not conveyed to BFG until months later). Further, Middleton's Declaration is nothing more than his own conclusions – not facts.

5. Middleton argues that, with these restrictions, he could have worked in the cold end or, with someone performing an essential job function, his old position in the hot end. Pet. 7. This ignores the fact that the restrictions expressly stated that Middleton was to be confined to a light duty position. BFG told Middleton when he brought his first "Employee Work Limitation Slip" that there were no such jobs available, but that he would be called "when a job suited to his position was open." Pet. 6.

"unordinary [sic] that he had this miraculous change in condition, that it was now temporary." R, Vol. 3, 590.[6]

Thus, by early August 1998, BFG faced the following undisputed facts: (1) Middleton, who had been off work for a continual one year and three month period, was unconditionally released to return to work in early January, 1998; (2) he then almost immediately missed work on two occasions (both times for medication problems, the longest of which lasted two (2) weeks); (3) in March, 1998, Middleton was placed under medical restraints by Osborn who was of the opinion that Middleton's work restrictions were permanent and that he should be given a different job; (4) this evaluation changed dramatically and unexplainedly after Middleton was told of his ineligibility for permanent disability benefits;[7] and (5) Osborn's new recommendations were, first that Middleton's limitations were "temporary for 8 weeks," later for "6 weeks," and later still for another "8 weeks." R, Vol. 3, 518, 602-03. Each of these "limitation slips" placed strict restrictions on the physical activities which Middleton could perform.[8]

On August 10, 1998 (which was shortly before the last "limitation slip" was to expire), Kirchner wrote Osborn a letter in which she stated:

> *It is our understanding that Steve Middleton still has certain restrictions that prohibit him from*

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6. Middleton attempted to paint Kirchner as uncaring, or even discriminatory because of these remarks (Pet. 8). However, as discussed below, the District Court found that Kirchner's caution and concern were "reasonable."

7. Osborn never provided a coherent explanation for this sudden diagnosis change. Under these circumstances, Middleton's attempt to paint this dramatic reversal in Osborn's diagnosis as simply a case of his condition improving is absurd. Pet. 25-26, n. 10.

8. Kirchner testified to her understanding that these "8-6-8" week references meant that thereafter Middleton would be *unrestricted*. R, Vol. 3, 593.

> *returning to his regular job as floor person.* We would like to ascertain whether he would be able to safely perform a different job in our plant with his current limitations. R, Vol. 3, 604 (emphasis added).

Kirchner then enclosed descriptions for certain "cold end" jobs.[9]

Osborn's reply, dated August 20, did not state that Kirchner's above-emphasized understanding concerning Middleton's floor person/apprentice operator job was incorrect. Rather, with no discussion or elaboration, he listed five cold-end jobs which he thought Middleton could do, and a sixth regarding which Osborn was uncertain. R, Vol. 3, 619.[10] On September 3, Kirchner responded to Osborn and

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9. Middleton criticizes BFG because this letter was sent "almost five months after Middleton's initial release to return to work. . . ." Pet. 8. This ignores the fact that, up until that time, Middleton had been under temporary "light duty" work restrictions, but there was no need for such in the plant. Middleton also overlooks the fact that Kirchner was the one who initiated the steps to get Middleton cleared for a return to duty of some kind. It was reasonable for Kirchner to wait until the end of Middleton's restrictive period before she began this effort.

10. Middleton claims that BFG could, and should, have brought him back to work in some light duty position prior to his reinstatement in the Summer of 2000. Pet. 11-12, 21-23. In so asserting, Middleton relies upon his own Declaration (Pet. App. 48-49) in which he stated that he had worked several light duty jobs in the past. However, there is no evidence in the record that any employee of BFG ever worked on a light duty job for more than one or two weeks. Further, these assignments are infrequent and on an "as needed" basis only. R, Vol. 3, 598, 644-45. In an attempt to remedy Middleton's lack of any meaningful evidence on the "light duty" issue, he points to the arbitration testimony of two BFG employees. Pet. 11-12, 123-24. However, the first witness could recall but three occasions in the previous two and one-half (2 ½) years where injured employees were given light duty jobs, and none that lasted more than two weeks. R, Vol. 4, 755-59. The second witness only could

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stated that BFG needed more information than what was provided in his August 20 letter, such as weight restrictions, range of motion, and physical activity limitations.[11] She added that BFG wanted an independent "second opinion from our own doctor," and asked that Osborn prescribe a Functional Capacity Evaluation ("FCE") from Baylorworx, BFG's regular medical provider. R, Vol. 3, 620.

On or about September 14, 1998, Middleton called Kirchner and stated that he did not want Baylorworx to perform the requested FCE. Instead, he asked that one be done by Sargent Injury Rehabilitation. Kirchner, who was unaware that Osborn in fact was an *employee* of Sargent, agreed. R, Vol. 2, 529-30, 542, 592-93. When she later got the Sargent FCE, it was obvious to Kirchner that this was *not* the independent second opinion which she had hoped to receive, and which she had stated in her September 3 letter she needed. R, Vol. 3, 593-95, 620. Rather, the FCE was signed by Osborn, the very chiropractor whose "first" opinion needed to be confirmed.[12] A short time after she got Osborn's FCE, Kirchner unsuccessfully attempted to reach Osborn by

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recall two instances of employees ever working light duty jobs. R, Vol. 4, 786. Under these circumstances, BFG cannot be faulted for failing to create light duty work for the twenty-two (22) weeks covered in Osborn's various "limitation slips," or thereafter. Further, Middleton totally fails to present any evidence that there was an actual light duty need in the plant which would have extended for longer than the two or three brief periods referred to at the arbitration, or that he had more seniority than the employees who actually got such temporary work (assuming that any did).

11. Middleton alleges that this request for more details is evidence of discrimination. Pet. 9. However, it was reasonable for Kirchner to expect to receive more than a terse listing of positions, with no elaboration.

12. Osborn acknowledged that he was the one who reviewed the raw data for Sargent and decided what was to go into the FCE. R, Vol. 3, 527-28.

phone. On November 5, 1998, she wrote him a letter and stated that there appeared to her to be "some contradictions between [Middleton's] restrictions [discussed in the FCE] and the physical demands of the above job." Kirchner therefore asked for clarifications. R, Vol. 3, 595-96, 629. Later, Osborn took a tour of the plant[13] and, on January 20, 1999, he wrote Kirchner and said that Middleton could return to the floor person/apprentice operator position "*provided he does not have to change out the cores on the molds himself.*" Additionally, Osborn noted that there were some cold end jobs which Middleton could do.[14] R, Vol. 3, 630 (emphasis added).

Kirchner then arranged for Cathleen Moore of Baylorworx to come to the plant to conduct a "job site assessment" of both hot and cold end jobs for Middleton.

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13. Middleton relies upon arbitration testimony from a local union officer to the effect that Kirchner stated in a grievance meeting that BFG wanted Osborn to make a plant tour "to be sure [Middleton] could safely perform [the job]." Pet. 10. However, this was a highly justifiable statement.

14. Middleton contends that sometime "after touring the plant [Osborn] came to believe that Middleton could perform the floor person job because it was a lighter job than he had envisioned (and it became lighter [sic] after he learned that the molds did not have to be changed in whole pieces)." Pet. 10-11, 21 n. 8. He made the same argument before the District Court, which found that Middleton's "contention [was] unavailing." Pet. App. 31. Thus, Middleton has presented no evidence that Osborn ever told BFG "why . . . he placed the mold changing restriction on him." *Id.* Further, on some molds the pieces broke down into 24-pound parts, but others had heavier separate components. Pet. 11, n. 3; *see also* R, Vol. 4, 914. Thus, there are parts which clearly were over the 25-pound restrictions put on Middleton by Osborn, and the rest were so close that the difference was negligible. Finally, Middleton does not say *when* Osborn made the "discovery" that the molds came apart in pieces. It is undisputed that, prior to the mid-April, 2000 arbitration hearing, Osborn never informed BFG that he had become aware of this fact or that it might make a difference in his opinion.

After the assessment, Moore concluded that changing molds was an essential floor person/apprentice operator job function (R, Vol. 3, 631-32, 636), an assertion to which Middleton readily has agreed. R, Vol. 2, 422, 496-97. On March 8, 1999, Kirchner wrote Middleton, told him that BFG had conducted a "formal job analysis," and said that it wanted to "match [his] ability with the essential functions of the job" in the cold end. For this purpose, she requested that he sign an attached "Release of Medical Information" which would allow BFG to "release the information on [his] FCE to the third party [Baylorworx] so an accurate comparison [could] be made." R, Vol. 3, 638.

Instead of receiving such a release, on April 12, 1999, Kirchner got a letter from Middleton's attorney threatening a lawsuit. Middleton's attorney also criticized BFG for wanting a release that would "authorize [it] to share [Middleton's] confidential medical information with a 'third party,'" and questioned why BFG was "unwilling to accept the opinion of Dr. Osborn." R, Vol. 3, 640. However, contrary to this letter from counsel, as well as to Middleton's arguments in his Petition (Pet. 10), Osborn admitted that under the circumstances it was reasonable for Kirchner to ask that an FCE be conducted. R, Vol. 3, 531-32, 543. He further admitted that the Sargent FCE was not an "independent second opinion." R, Vol. 3, 544-46. Osborn acknowledged that the FCE would be confusing to a layperson, and that Kirchner could not be faulted for having concerns and for not accepting the FCE as "gospel from [him]." In fact, Osborn conceded that Kirchner "had a right" to question the FCE, "absolutely." R, Vol. 3, 547-50. Middleton mentions none of these facts in his Petition.

On April 21, BFG's counsel wrote Middleton's attorney a reply explaining, among other things, that because "Osborn has made . . . contradictory statements" which included "on more than one occasion stating that Middleton would never be able to perform the function of the Floor Person position,"

BFG wanted a "second opinion on Mr. Middleton's abilities." R, Vol. 3, 642-43. *Middleton's counsel never responded to this letter.*

On July 19, 1999, Todd Glawe (Kirchner's replacement as Human Resources Manager) wrote Middleton stating that there had been a recall from layoff in the cold end, and that he then had seniority[15] for one of those jobs but:

> We must ascertain which jobs you are currently able to safely perform. For this reason, the Company requests that you have a [FCE] performed by the Company physicians. R, Vol. 3, 652.[16]

Later, BFG dropped its request for a new FCE and, for several months following this July 19 letter, the parties communicated concerning BFG's request for Middleton to release his Sargent FCE to Baylorworx for its review. R, Vol. 3, 655-57. The last letter from BFG on this subject was one to Middleton's counsel dated October 5, 1999.

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15. Regarding the seniority issue, Middleton has presented no evidence to rebut the Arbitrator's finding that "until this letter was sent, Middleton did not have sufficient seniority for a position in the cold end." Arb. Award, App. 17. Prior to that date, the plant was in layoff status. In this regard, Middleton cannot rely upon the arbitration testimony of one union witness because this person admitted that he only "approximately" knew what Middleton's seniority was. Significantly, this witness also stated that Middleton's seniority, as he knew it to be, would have been insufficient to have protected him from layoff during the relevant time period. R, Vol. 4, 784-85. Therefore, the District Court clearly was correct in concluding that: (1) "there is no showing that [Middleton] was not given a job that a more junior employee received;" and (2) "the evidence is insufficient to show Middleton's proper order in being recalled." Pet. App. 34.

16. The only response to this July 19, 1999, request was an August 23 letter from Middleton's attorney to BFG's counsel stating that BFG's job-related communications with its employee Middleton was "a violation of the Cannon of Ethics." R, Vol. 3, 653. On August 24, BFG's new counsel responded and refuted these assertions. R, Vol. 3, 654.

It asked simply that Osborn confirm that Middleton's physical condition "is unchanged since the [FCE]" and that a release be executed:

> permitting us to show the FCE to Baylorworx so that they can compare your client's physical limitations with their assessment of the essential functions of the job. These documents should obviate the need for a physical examination and will expedite Mr. Middleton's return to work. R, Vol. 3, 658.

Middleton's attorney never responded to this letter. However, during and following, Middleton's deposition on June 13, 2000, a dialogue ensued that eventually satisfied BFG's desire for permission to give the Sargent FCE to Baylorworx. The end result was that a few weeks later, on July 26, 2000, an offer was made to return Middleton to a cold end job. He accepted and is working at the plant today. R, Vol. 3, 665.[17]

IV. ARGUMENT: REASONS FOR DENYING THE WRIT

1. THE "QUESTIONS PRESENTED FOR REVIEW" PROFFERED BY MIDDLETON ARE PREMISED UPON "FACTUAL" ASSERTIONS THAT WERE REJECTED BY THE COURTS BELOW

Middleton's "Questions Presented for Review" assume as "fact" such assertions as "[BFG] thwarted [Middleton's] return to work" (Question 1); "[BFG] prohibit[ed] [Middleton] from working even through [Middleton and Osborn] maintain that [Middleton] is otherwise qualified" (Question 2); etc. However, each of these factual allegations were found *against* Middleton in the courts below. Middleton's factual premise also is undercut by the testimony

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17. Middleton implies that BFG's ultimate success in getting Middleton back on the job was a result of his filing the instant lawsuit. Pet. 27. However, suit was filed on April 28, 1999, fifteen (15) months before the requested release finally was obtained.

of Osborn, the "physician" upon whom Middleton relies throughout his Petition. Osborn acknowledged that: (1) it was reasonable for BFG to ask that an FCE be conducted; (2) the Sargent FCE was not the "independent second opinion" that BFG had requested; (3) the FCE in which Osborn participated would be confusing to a layperson and BFG should not have accepted it as "gospel from [him];" and (4) BFG "had a right" to question the FCE "absolutely." R, Vol. 3, 531-32, 543-50.

Due to these admissions and the other facts in this case, it is not surprising that the Fifth Circuit affirmed the Opinion and Order of the District Court, which found in part that:

> [Middleton] delayed in responding to [BFG's] requests, and quarreled with whether a release had been given but refused to simply grant a new release. [BFG] initiated [Middleton's] eventual return to work in the cold end. Pet. App. 39.

As further found by the District Court: (1) it was "reasonable for [BFG] to desire medical evidence of [Middleton's] capacity to work in his previous job or any other job within the plant;" (2) BFG's "reluctance to accept the opinion of Dr. Osborn is entirely reasonable in light of his abrupt change in diagnosis of [Middleton] from permanently disabled to temporarily restricted from work;" (3) "[i]t was reasonable for [BFG] to suspect that the change in diagnosis might have resulted from Dr. Osborn's knowledge that [Middleton's] benefits application had been denied;" (4) BFG "was justified in seeking a second independent opinion and had ample reason to do so;" and (5) BFG "frequently initiated the correspondence between the parties, indicating a willingness to resolve the questions of Middleton's fitness to work." Pet. App. 37-38.

Additionally, the arbitrator heard the testimony of numerous witnesses, including Middleton, Osborn and Kirchner. The Union was represented by an attorney at the

hearing, whom Middleton acknowledged "did a wonderful job." He also admitted that the Union itself "did all it could to represent [Middleton's] interests in that arbitration." R, Vol. 2, 438-39.[18] It is significant to the instant appeal that, while less diplomatic than was the District Court, the Arbitrator agreed with it regarding whose fault it was that Middleton had not been reinstated into a plant job:

> When [Middleton's] personal attorney refused to allow [his client's] FCE to be studied by the therapist at Baylorworx, or to allow him to be examined by the Company doctor, that attorney – and not the Company – has kept [Middleton] from returning to work at some job in the Plant for which he is qualified, and for which his seniority will permit.
>
> x x x
>
> It is my opinion and finding that had it not been for the obstructive and uncooperative position taken by the Grievant's personal attorney, the Grievant would have been returned to work long before this time.
>
> x x x
>
> I have found that the Company tried to find a way to safely return the Grievant to work, while

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18. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court ruled that, while not preclusive, arbitral awards under a collective-bargaining agreement "may be admitted in evidence" in a subsequent proceeding. *Id.* at 60. The weight to be given such an award depends, among other things, on issue similarity, the fairness of the arbitration hearing, and the adequacy of the record. *Id.* at 60, n. 21. In the instant matter, the grievance involved whether BFG violated the collective bargaining agreement by not putting Middleton back to work when he wanted, and the arbitration hearing lasted two full days. In a thorough decision (Arb. Award, App. 1-34), the Arbitrator denied the grievance.

> satisfying itself that he would not re-injure himself when allowed to work at certain jobs. It was the Grievant's personal attorney who did "everything within its [sic] power to block . . . Mr. Middleton's return to work." Arb. Award, App. 27-28, 30-31.

Some of the delay about which Middleton complains was due to the fact that, from late March until late August 1998, Middleton's health care provider restricted his work activities to "light duty," which BFG did not have available at the time. Then, shortly before the last work restriction written by Osborn was to expire, BFG asked him to advise whether Middleton could perform certain "cold end" jobs, but Osborn's reply was simply a listing of certain of these jobs with no information about any restrictions which Middleton might have with respect to them.[19] In addition, the FCE which Osborn performed said in one place that Middleton could work a variety of jobs, but in another stated that he was "restricted on a repetitive basis" from performing every physical task for which he was tested.

Subsequent to Osborn's plant tour, BFG had Baylorworx conduct an analysis of the cold end jobs. BFG then asked Middleton to sign a release so that the FCE could be shown to Baylorworx for comparison with the requirements of these positions. Not only did Middleton not comply with this request, but in an April 9, 1999, letter, his counsel chastised BFG for even asking that Middleton "authorize [Defendant] to share his confidential information with a 'third party.'" R, Vol. 3, 640-41. This response was a clear rejection of BFG's reasonable request. The subsequent letter written to Middleton's lawyer by BFG's counsel, which explained the reasons for BFG's concerns, went unanswered.

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19. Osborn's reply contained no explanation whatsoever of Middleton's physical capabilities and, for this reason, BFG told Osborn it wanted more information, as well as a second opinion. However, BFG never received a second opinion because the subsequent FCE was performed by a company for which Osborn worked as an employee and it was signed by him.

BFG's July 19, 1999, letter to Middleton regarding the layoff recall in the cold end of the plant only resulted in contentious correspondence between counsel, the last of which was from BFG's attorneys and consisted of simply a request for a release for the Sargent FCE, and also a statement from Osborn "confirming that Mr. Middleton's condition is unchanged since the [then one-year old FCE]." R, Vol. 3, 658. There was *no* response to this letter.

When Middleton and his counsel learned that BFG wanted the release, they could have done one of three things. First, they could have complied, even if they thought it was unnecessary. Second, if they believed that earlier "releases" provided the requested authorization, they could have so stated.[20] However, they did *neither*. Instead they took the third option, which in some cases was to refuse to comply with the requests, and with regard to the letters from BFG's counsel of April 21 and October 5, 1999, to ignore them completely. Clearly, the District Court was correct in its findings, quoted above, that BFG was warranted in being suspicious of Osborn and careful in making certain that Middleton's return to work would not result in additional injury. Also, the District Court and the Arbitrator were exactly right in assigning blame for the resulting delay.

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20. In attempting to excuse the conduct of his counsel and chiropractor, and to cast the blame on BFG for the delay in Middleton's returning to work, Middleton argued before the courts below (and he may in a Reply to this Response) that BFG should have given the FCE to Baylorworx without a specific release. Middleton argued that because, in discovery, he had signed an authorization for BFG to obtain medical records from his providers, and also because he had signed some releases for BFG's insurance company, BFG did not "need" a release before giving the FCE to Baylorworx. However, an authorization to get medical records *from* a third party is not license to give such records *to* another third party. Also, Middleton never produced these documents for the lower courts' consideration. Moreover, Middleton ignores the contradictory fact that, in the very first letter which his counsel wrote to BFG, his lawyer took BFG to task for even seeking an authorization to "share [Middleton's] confidential medical information." R, Vol. 3, 640-41.

2. MIDDLETON WAS NOT "DISABLED"

In order to be "disabled" within the meaning of the ADA (and thus to come under its protections), an individual must suffer a physical or mental condition that "substantially impairs" one or more "major life activity; have a record of such impairment; or be regarded as having one." 42 U.S.C. § 12102(2); *see Brangdon v. Abbott*, 524 U.S. 624, 631 (1998). Not all "impairments" are serious enough to be statutory disabilities. *See Toyota Motor Mfg. Ky., Inc. v. Williams*, 122 S. Ct. 681, 690-91 (2002). An impairment which would qualify as a "disability" is one that:

> prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term. *Id.* at 685.

Middleton claims that he was "substantially limited" in his major life activities as a result of his impairment, including such things as *excessive* driving, walking, jogging, and lifting weights. Pet. 18, n. 7. The only factual support for this assertion comes from his osteopath, who also said that Middleton could not "walk a golf course." R, Vol. 4, 794.[21] Under these facts the

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21. As found by the District Court, "there is no evidence that jogging is a major life activity, many people who cannot jog are not disabled. There is no evidence to support [Middleton's contention] that the inability to walk a golf course constitutes a disabled condition." Pet. App. 24. Likewise, as determined by the courts below, the fact that, according to a letter from Middleton's osteopath (R, Vol. 4, 797), Middleton cannot drive more than 25-30 miles at a stretch does not render him disabled. Pet. App. 24-25. Further, Middleton has admitted that, even with his physical limitations, he is able to take 30-minute walks in the morning, do odd jobs around the house that require no heavy lifting, dig holes while working part time on a house-remodeling crew, etc. R, Vol. 2, 440-43. Also, as discussed above, it is undisputed that Middleton has been working at the plant for the past two years.

District Court clearly was correct in: (1) agreeing with BFG's "common sense approach that an inability to perform [the above-described] activities *to excess* is a common trait of all people," and (2) finding that "walking golf courses," "jogging," etc., are not major life activities. Pet. App. 24-26. Also, the Fifth Circuit was justified in affirming these findings. Such findings and conclusions with respect to driving, walking, jogging, playing golf, etc. are precisely the kinds of activity that this Court has found were *not* "of such central importance to most people's daily lives that they establish a . . . disability as a matter of law." *Toyota*, 122 S. Ct. at 694.[22]

Even though this Court has never ruled that "working" is a "major life activity" under the ADA (*see Toyota*, 122 S. Ct. at 692-93), throughout his Petition Middleton assumes that it is and that the courts below misapplied the law on this issue. However, to the extent that Middleton has proffered proof that his condition interfered with work, such falls far short of proving a substantial limitation. To the contrary, Middleton has contended throughout that he could do *any* of the disputed jobs. Obviously, if his condition would allow him to perform such jobs he does not have substantial limitations in the "major life activity" of working.

Moreover, Middleton's highly questionable "medical" evidence does not prove that he was substantially limited with respect to working. Thus, depending on which medical record is consulted, and at what time, Middleton had numerous, often changing, work restrictions, none of which substantially limited his ability to work within the meaning of the ADA. For example, his work restrictions included a 25-pound lifting limitation, but many lower courts have held that the inability to lift heavy objects is *not* a substantial limitation on working, or on any other major life activity.

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22. The physical limitations possessed by the Petitioner in *Toyota* included dancing, gardening, and driving long distances. *Id.*

See, e.g., Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 22 (1st Cir. 2002); *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1241 (10th Cir. 2001); *Gutridge v. Clure*, 153 F.3d 898, 900-901 (8th Cir. 1998); *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997); *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (9th Cir. 1996); *Ray v. Glidden Co.*, 85 F.3d 227, 229 (5th Cir. 1996). The rationale behind these universally-held opinions is that:

> [I]f a restriction on heavy lifting were considered a substantial limitation on a major life activity, then the ranks of the disabled would swell to include infants, the elderly, the weak, and the out-of-shape. Congress obviously did not mean to extend the protections of the ADA to every physical impairment that precluded the performance of some particularly difficult manual task. *Gillen*, 283 F.3d at 22-23 (citing *Toyota*, 122 S.Ct. at 691).[23]

Yet, the only arguably significant physical restriction placed upon Middleton by Osborn that conceivably could "substantially limit" the "major life activity" of working, was the above-discussed one of not lifting more than 25 pounds. This restriction was relevant only to the "hot end" job which Middleton held prior to his injury. However, assuming that working is a major life activity, "substantially limits" means that an individual is restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparative training, skills, and abilities. If an employee is unable to perform only a few particular jobs or tasks, he/she is *not* substantially limited in the major life activity of working. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491-92 (1999).

23. Significantly, as found by the District Court (Pet. App. 23-24), Middleton did not contest BFG's argument that the inability to lift twenty-five (25) pounds was not substantially limiting.

It cannot be disputed that there is a myriad of other manufacturing jobs, including ones at BFG in the cold end, that do not require lifting over 25 pounds or the other restrictions placed upon Middleton. Indeed, Osborn is on record as believing that Middleton could perform various cold end jobs (and he has been doing so since July, 2000). As a result, he was *only* limited in one specific job, *not* a broad range or even a class of jobs, and thus was not "substantially limited" in working. Therefore, Middleton was not disabled within the meaning of 42 U.S.C. § 12102(2)(A).[24]

Finally, acknowledging that it was a "close question," the District Court concluded that a jury could believe that BFG "regarded" Middleton as disabled based upon its seeking further medical information. Pet. App. 28-29. In direct contradiction, when the District Court rejected Middleton's ADA retaliation claim, it expressly found that it was "reasonable" for BFG to have: (1) asked for medical evidence of Middleton's abilities; and (2) questioned "the opinions of Dr. Osborn." Indeed, "[BFG's] request [for additional information] was not intended to unduly obstruct [Middleton's] return to work." Pet. App. 37-38. Therefore, it is clear that the District Court gave Middleton more of a benefit of a doubt on the "regarded as" issue than he was entitled to, as the Fifth Circuit realized when it found that BFG did not perceive Middleton as disabled, because "the inability to perform a particular job does not constitute a substantial limitation on the major activity of working." Pet. App. 2 (citing *Toyota*).

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24. The District Court found that "[Middleton] cites no evidence that [his] record differs at all from his contentions of disability." Since the Court ruled that Middleton was not disabled, it properly concluded that he had no record of disability. Pet. App. 27. *See Pryor v. Trane Co.*, 138 F.3d 1024, 1028 (5th Cir. 1998). *See also Coldwell v. Suffolk County Police Dept.*, 158 F.3d 635, 645 (2d Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999).

This Fifth Circuit finding was appropriate because the evidence in this case shows clearly that the focus of BFG's dealings with Middleton and Osborn was directed to various cold end jobs (since Middleton's previous hot end position was physically unavailable to him). As Middleton himself admits, as early as his April 15, 1998 application for permanent disability benefits, Kirchner was of the view that "the validity of the claim should be questioned since there were other types of work Middleton could perform." Pet. 6. In BFG's efforts to get Middleton back to work, Kirchner's August 10, 1998 letter to Osborn listed several cold end jobs which she wanted Osborn to evaluate based upon Middleton's physical abilities. Further, Kirshner arranged for Baylorworx to come to the plant to do an assessment of the cold end jobs. BFG's efforts to get a release, which Middleton and/or his attorney stonewalled, were intended to provide a comparison between his physical abilities and those positions.

It is clear that BFG simply did not know what Middleton's condition was *vis-à-vis* the physical demands of any of the jobs, and its efforts to find out were constantly frustrated, as discussed at length above. In sum, even if BFG did think that Middleton could not safely perform the hot end job, since it was willing to place him in the cold end (which it ultimately did) such belief did not constitute "regarding" him as disabled. *See Sutton*, 527 U.S. at 492-93 (regarding employee as precluded from one job is *not* perceiving a "substantial limitation").[25] *See also Toyota*, 122 S. Ct. at 693; *Murphy v. United Parcel Serv.*, 527 U.S. 516, 523 (1999) ("to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job").

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25. Middleton argues that if BFG was willing to place him in other jobs, he "should have been permitted to return to work long before August 2, 2000." App. 19. The short response to this is that the key to that door always was in *Middleton's* hands, but he consistently refused to unlock it.

3. MIDDLETON WAS NOT A QUALIFIED PERSON WITH A DISABILITY

Middleton contends that BFG violated the ADA because (assuming he was disabled) BFG failed to make "reasonable accommodations" for his "disability." Pet. 20-22. *See also* 42 U.S.C. §§ 12111(8)-(10). Here again, however, Middleton relies upon alleged "facts" which were found against him by the courts below.

Based on these facts, the District Court correctly concluded that, even if Middleton was "regarded as" disabled, he also must be a "qualified individual with a disability." Pet. App. 30. A "qualified individual" with a disability is a person who can perform the essential functions of his job with or without reasonable accommodations. *See Sutton*, 527 U.S. at 478. It is undisputed that changing molds is an essential function of Middleton's hot end job, but the solution proposed to BFG by Osborn, *i.e.*, assigning someone else to perform this task clearly is *un*reasonable. Pet. App. 30. *See Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1093-94 (5th Cir. 1996) (the law requires that the employee be able to perform the essential job functions, not *almost all* of them, or most of them). *See also Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993) (an otherwise qualified person is one who is able to meet all of the program's requirements in spite of his disability).

As he did before the courts below, Middleton argues here that it would have been "reasonable" for BFG to have assigned an upkeep person to assist him in the mold change essential function, and he asserts that he received such assistance on occasions in the past. Pet. 21. However, Middleton fails to mention that, even when the plant had an upkeep on each of the four (rotating) shifts, an upkeep person was not always available for such assistance, and since all but one upkeep position was eliminated in a 1999 reorganization, no such assistance thereafter would have been

available to Middleton or anyone else, except during very limited times. R. Vol. 3, 672-76. Accordingly, Middleton simply is wrong in this reasonable accommodation argument, as found by the District Court (Pet. App. 30-31) and affirmed by the Fifth Circuit.[26]

Also without merit is Middleton's argument that Ball-Foster failed to reasonably accommodate him by giving him light duty work in the cold end of the plant. Pet. 22-24. Middleton cannot defeat summary judgment on this point because he has no evidence that there were any light duty assignments which were available to him, which he could perform, and for which he had seniority.[27] Further, BFG was under no duty to create a light duty position. *See School Board of Nassau County v. Airline*, 480 U.S. 273, 289 n. 19 (1987).[28]

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26. *See Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675, 681-82 (8th Cir. 2001) ("an employer is under no obligation to reallocate the essential functions of a position that a qualified individual must perform"); *Hanson v. Henderson*, 233 F.3d 521, 523 (7th Cir. 2000) (an employer need not "manufacture a job that will enable the disabled to work despite his disability"); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995) (employer does not have a duty to eliminate essential job function).

27. In *U.S. Airways, Inc. v. Burnett*, 122 S. Ct. 1516, 1523-24 (2002), this Court held that a seniority system like that of BFG "ordinarily" trumps an employer's obligation to transfer an "individual with a disability" into a position for which the person's seniority was inferior to that of another employee. The possible exception to this rule which the Court articulated was where the evidence showed that the seniority system had been disregarded in the past. There are no such facts here.

28. *See also Turco*, 101 F.3d at 1094 (employer need not create light-duty position); *Allen v. Georgia Power Co.*, 980 F. Supp. 470, 477-78 (N.D. Ga. 1997) (employer was not required to create permanent light-duty position for plaintiff); *Hershey v. Praxair, Inc.*, 969 F. Supp. 429, 435 (S.D. Tex. 1997) (employer is not required to create general light-duty clerical position to accommodate employee

(Cont'd)

4. ASSUMING THAT BFG WAS REQUIRED TO DO SO, IT ENGAGED IN AN "INTERACTIVE PROCESS"

Middleton claims that summary judgment was inappropriate because BFG "nullified the ADA's interactive process." Pet. 27-28. The Equal Employment Opportunity Commission ("EEOC") has promulgated regulations concerning "reasonable accommodation" under the ADA. Thus, 29 C.F.R. § 1630.2(o)(3) states:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

Because the language "may be necessary" is permissible and not mandatory, and assuming the regulations were adopted by the Courts, they would not create independent liability for failing to engage in dialogue with an employee in an attempt to find reasonable accommodation. *See, e.g., Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (plaintiff has the burden of showing reasonable accommodations and the employer cannot be found liable "merely for failing to engage in the [interactive] process itself"); *White v. York Int'l Corp.*, 45 F.3d 357, 363 (10th Cir. 1995) (EEOC regulations only recommend that an interactive process occur, and only after the employee shows that reasonable accommodation is available).

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with physical restrictions); *Puckett v. Porsche Cars of N.Am., Inc.*, 976 F. Supp. 957, 967 (D. Nev. 1997) (employer was not required to create permanent light-duty position), *aff'd*, 165 F.3d 917 (9th Cir. 1998); *Rochford v. Cheshire*, 979 F. Supp. 116, 121-22 (D. Conn. 1997) (plaintiff's request for creation of new light-duty position was unreasonable).

In this case, even though it was not required by law or regulation to do so, BFG clearly engaged in an interactive process. When Middleton presented BFG with the "permanent" light duty and job change note from Osborn, no "interactive process" was necessary. Middleton never has presented proof that at the time there was an actual need for light duty in the plant, permanent or temporary. Similarly, when Middleton later submitted his series of "temporary light duty job" notices from Osborn, which (collectively) covered a period of twenty-two (22) weeks, any attempt at an "interactive process" with Middleton also would have been futile because BFG did not need such work to be done.[29]

A short time before Middleton's last "temporary light duty" restriction expired, it was *BFG* that initiated discussions with Osborn concerning which cold end jobs would be compatible with his physical restrictions. When Osborn failed to enlighten BFG with anything other than a terse listing of positions, it was *BFG* that continued the dialogue with Osborn, which included asking that an independent second opinion be obtained. When Osborn later submitted an FCE, which clearly was not an independent second opinion, BFG arranged for Osborn to tour the plant. At around that same time, BFG paid for Baylorworx to make an evaluation of Middleton's old job in the hot end, as well as several positions in the cold end.

BFG's efforts to get Middleton back to work continued with its request that he execute a release so that Baylorworx could consider which jobs best suited his abilities. Instead of cooperation, however, BFG received a threatening letter from Middleton's counsel, with an admonition to BFG for even seeking to "share [Middleton's] confidential information

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29. BFG cannot be faulted for failing to create a six (6) month "light duty" position for Middleton when there is no evidence that any other employee had ever come close to receiving such an assignment. *See Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1528 (11th Cir. 1997); *Turco*, 101 F.3d at 1094.

with a 'third party.'" Subsequent efforts by BFG to put Middleton back to work in a job he safely could perform were frustrated. It was not until after Middleton's June 2000 deposition that BFG got the permission it had been seeking for well over a year for it to show the FCE to Baylorworx. Middleton returned to work within a few weeks after such permission was obtained.

As found by the District Court, as well as by the Arbitrator, the fault for the delay which Middleton experienced in returning to work *cannot* be put upon BFG. Rather, the fault is that of Middleton and/or his chiropractor or counsel. Under these circumstances, BFG can not be held liable. *Templeton v. Neodata Serv., Inc.*, 162 F.3d 617, 619 (10th Cir. 1998) ("[a]n employer cannot be expected to propose reasonable accommodation absent critical information on the employee's medical condition and the limitations it imposes"); *Steffens v. Stephan Co.*, 144 F.3d 1070, 1073 (7th Cir. 1998) ("because [plaintiff] failed to hold up her end of the interactive process by clarifying the extent of her medical restrictions, [defendant] cannot be held liable for failing to provide reasonable accommodations"); *Buck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1136 (7th Cir. 1996) (accord).

5. MIDDLETON WAS NOT RETALIATED AGAINST

Middleton's Petition does not raise retaliation as one of the "Questions Presented for Review." Nor does he quote the ADA retaliation provision, 42 U.S.C. § 12203(a) as an "Applicable Statute." However, in the "Argument" portion of his Petition, Middleton asserts that he established "a *prima facie* case of ADA retaliation." Pet. 24. Middleton argues that he made out a *prima facie* case because of BFG's alleged delays in bringing him back to work, as well as when "BFG nullified the interactive process." Pet. 25.

Clearly, however, Middleton has no proof of a causal connection between his exercising any ADA right and the

events of which he complains. For this reason, the District Court was correct in concluding that it could not:

> [D]iscern any attempt at retaliation against [Middleton]. [BFG] had a legitimate concern about the safety of Middleton and the liability of [BFG] should Middleton be hurt again in a job for which he was not qualified. Pet. App. 37.

See also Shirley v. Chrysler First, Inc., 970 F.2d 39, 42 (5th Cir. 1992) (the employer must have taken the adverse employment action because the plaintiff engaged in protected activity, *i.e.*, the employer must have had a retaliatory motive); *Jones v. Flagship Int'l*, 793 F.2d 714, 724 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (accord). There simply is no proof here that Ball-Foster had any retaliatory motive, or that it was guided by any goal other than a desire to make certain Middleton could perform the various job functions. In short, notwithstanding Middleton's argument to the contrary, there is no proof that BFG acted in anything other than a "reasonable," non-retaliatory manner. Pet. App. 37-39.

6. THE FIFTH CIRCUIT DID NOT MISAPPLY *TOYOTA*

Toyota was decided subsequent to the Decision and Order of the District Court, but prior to that of the Fifth Circuit. Middleton argues that the Fifth Circuit misapplied *Toyota* for several reasons, including that the Lower Court's ruling: (1) means that "every employer [can] refuse to permit any disabled employee from returning to work by simply claiming that the employee cannot work" (Pet. 13); (2) there simply is no basis for the Fifth Circuit's application of *Toyota* to cases involving "regarded as" disability (Pet. 14); and (3) "the Fifth Circuit's declaration that, based upon *Toyota*, an inability to perform a particular job does not substantially limit the major life activity of working is nonsensical and constitutes a major error in the law." Pet. 15. However, it is clear that: (1) Middleton's criticisms of the Fifth Circuit have their genesis in a factual assumption that BFG was responsible

for the delay in his return to work, when the facts, the findings of the courts below, as well as the Arbitrator's decision squarely are to the contrary; (2) *Toyota* in fact involved "regarded as" allegations; and (3) the only "nonsense" and "major legal error" in this case are that of Middleton, and not the Fifth Circuit.

Thus, as stated above, Middleton's factual allegations leading to his proffered conclusion that BFG discriminated against him because of delay were flatly rejected by the District Court (and affirmed by the Fifth Circuit), as well as by the Arbitrator. Accordingly, the litany of horrible miscarriages of justice suggested by Middleton (*e.g.*, that the lower court's decision "transform[s] the interactive process under the ADA [to] a means to effectuate rather than prevent discrimination" (Pet. 16)) simply have no application to this case.

Further, Middleton overlooks the fact that *Toyota* raised allegations that the plaintiff was "regarded as having an impairment." *See Toyota*, 122 S. Ct. at 687. With respect to whether the plaintiff was "disabled" or "regarded as disabled," the Court in *Toyota* stated that it had not previously found that "working" was an "major life activity." Nevertheless, the Court reaffirmed its ruling in *Sutton* (527 U.S. at 491-92) that, assuming working was such an activity, "a claimant would be required to show an inability to work in a 'broad range of jobs' rather than a specific job." *Toyota*, 122 S. Ct. at 693-94.

Regardless of whether Middleton was "disabled" or "regarded as" such, his argument that the Fifth Circuit's reliance upon *Toyota* is "nonsense" and a "major error in the law" is nothing more than nonsubstantive hyperbole. Further, it ignores the fact that *Sutton* involved solely the "regarded as" portion of the ADA's "disability" definition. 527 U.S. at 487. ("[Plaintiffs] contend only that respondent mistakenly believes their physical impairments substantially limit them

in the major life activity of working"). *Sutton's* companion case likewise involved only the "regarded as" issue. *Murphy*, 527 U.S. at 521-22. In sum, the Fifth Circuit was faithful to *Toyota*, as well as to *Sutton* and *Murphy*, when it held that Middleton's "inability to work a particular job [the one in the hot end] does not constitute a substantial limitation on the major life activity of working." Pet. App. 2.

7. THE FIFTH CIRCUIT DID NOT "IGNORE" MIDDLETON'S EVIDENCE

In furtherance of his attack on the Fifth Circuit, which he accuses of having a

> proclivity for deviating from the basic summary judgment burdens of proof as set forth in Fed. R. Civ. P. 56 and by this Court in cases such as *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133 (2000) (Pet. 16-17),

Middleton claims that the Court of Appeals "ignored" his evidence on a number of issues. Pet. 14-16, 27. However, Middleton points to nothing specific in the Fifth Circuit's *per curiam* opinion that constituted that Court's giving his "evidence" anything other than the consideration it was due.

Thus, the Fifth Circuit affirmed the District Court "essentially for the reasons given" by it in its "comprehensive Memorandum Opinion and Order." Pet. App. 2. Indeed, that Memorandum Opinion and Order occupies thirty-six (36) pages of Middleton's Appendix. Throughout that decision, the District Court constantly cited Middleton's summary judgment evidence (*see, e.g.*, Pet. App. 7-8, n. 6-13; 32-34, n. 76-83), and discussed and analyzed that evidence, but ultimately ruled that no reasonable jury could hold for Middleton on the essential points of his being "otherwise qualified" or the victim of retaliation. Pet. App. 35, 39. In so doing, it is abundantly clear that the District Court concluded that Middleton had failed in his burden to show that the nondiscriminatory reasons put forth by BFG were false; and

also it found that Middleton's case on the "regarded as" issue was (to put it charitably) weak. Under these circumstances, the District Court's granting of summary judgment, and the affirmance by the Court of Appeals, was justified. *See Sanderson*, 530 U.S. at 148-49.

Middleton's real complaint seems to be that the Fifth Circuit did not issue a lengthy, detailed decision, but instead treated the matter in a *per curiam* opinion. However, as stated by this Court:

> We, of course, agree that Courts of Appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmance. *Taylor v. McKeithen*, 470 U.S. 191, 194, n. 4 (1972).[30]

Accordingly, Middleton's contention that the *per curiam* opinion by the Fifth Circuit is proof that his evidence was not "considered" is baseless.

8. THE PETITION DOES NOT RAISE ANY ISSUE WARRANTING REVIEW BY THIS COURT

Rule 10 of this Court gives several reasons why it might grant a Writ of Certiorari, none of which applies here. Thus, Rule 10(a) states that certiorari might be granted if the Fifth Circuit's decision had conflicted with that of another Court of Appeals. Middleton does not contend that this is the case. Rule 10(b) (ruling of a state court) is inapplicable on its face. As to Rule 10(c), BFG has demonstrated above that the Fifth Circuit's *per curiam* order does not conflict with *Toyota* or any other relevant decision of this Court. Furthermore, it is abundantly clear from the discussion above

30. *See also United States v. Garza*, 165 F.3d 312, 314 (5th Cir. 1999) ("a litigant's right to have all issues considered and ruled on by the appellate court does not equate to a full written opinion on every issue raised"); *Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983) ("there is no requirement in law that a federal appellate court's decision be accompanied by a written opinion").

that Middleton's Writ is substantially based upon his version of the facts, which were found against him by the Courts and the Arbitrator below. Thus, this is one of those cases where "a petition for a writ of certiorari is rarely granted." Rule 10 (final paragraph).

V. CONCLUSION

For the reasons stated above, summary judgment was appropriate on all points raised by Middleton in his Petition. Also, because Middleton's Writ has as its foundation assertions of fact which were decided against him, his Petition for a Writ of Certiorari should be denied.

WHEREFORE, Respondent Ball-Foster Glass Container Company, L.L.C. respectfully prays that Petitioner's Writ of Certiorari be denied and that the judgments of the Fifth Circuit and the District Court be affirmed.

Respectfully submitted,

RICHARD M. KOBDISH
FULBRIGHT & JAWORSKI L.L.P.
Attorneys for Respondent
2200 Ross Avenue
Suite 2800
Dallas, Texas 75201
(214) 855-8000